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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

## No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,
*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER.

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## BRIEF FOR J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER.

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### Opinions Below.

The opinion of the Circuit Court of Appeals appears at Page 112 of the Record and is reported in *Morgan* v. *Commissioner*, 103 Fed. (2d) 636. The opinion of the Board of Tax Appeals appears at Page 91 of the Record and is reported in *Morgan* v. *Commissioner*, 36 B. T. A. 588.

## Jurisdiction.

The opinion of the Circuit Court of Appeals was entered on April 22, 1939. The petition for writ of certiorari filed by J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, was granted by this Court on October 9, 1939. The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals on a writ of certiorari is conferred by Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, Par. 1, 43 Stat. 938 (Title 28, U. S. C. A. Sec. 347).

## Statement of the Case.

The petitioner, on January 23, 1936, filed his petition with the Board of Tax Appeals (R. 2), praying for a redetermination of a deficiency which resulted from the inclusion by the Commissioner, in the value of the gross estate of said decedent, of the value of certain property in respect of which the decedent held powers of appointment, which powers she had exercised by her last will and testament.

Elizabeth S. Morgan died May 3, 1933, a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, Wisconsin. She left a will (R. 79) which was admitted to probate in the County Court of Winnebago County, Wisconsin, and J. Earl Morgan, petitioner, her husband was duly appointed executor thereof (R. 75).

Isaac Stephenson, the decedent's father, died March 15, 1918, leaving a will dated June 15, 1916 (R. 38) and three codicils (not bearing on this case), the will creating a trust (R. 41) for the benefit of decedent and other beneficiaries. The will and codicils were admitted to probate in the County Court of Marinette County, Wisconsin, on May 7, 1918 (R. 76). In his will the testator directed

the trustees under the testamentary trust created in his will to divide his trust estate into nine equal parts, one for each child and testator's widow, respectively. He provided that his daughter, Elizabeth S. Morgan, should receive from his trustees one-fourth of her part of his trust estate, at the end of four, eight, twelve and sixteen years, respectively, after his death (R. 48, 49). She duly received such one-fourth of her part at the end of four, eight and twelve years, respectively. She died before the expiration of sixteen years after her father's death, and respondent for the purpose of this assessment of the estate tax included the last one-fourth of her part of the said testamentary trust estate in her gross estate (R. 11).

Isaac Stephenson, by his will, gave to the appointee or appointees of his said daughter, to be appointed by her will, all the property remaining in her part of the trust estate at her death (R. 49). She exercised the above power by appointing in her will, her husband, J. Earl Morgan (R. 82), to receive during his lifetime the income of all the property in her part of the estate of her father remaining in the hands of his trustee at the time of her death.

The will of Isaac Stephenson further provided, that should his daughter, Elizabeth S. Morgan, die without issue without having by her will appointed a person or persons to receive her part of the property remaining in her father's testamentary trust at the time of her death, then her part of the trust estate should cease to exist, and all the property then remaining in such part should be distributed among the existing remaining parts. The testamentary trust under the will of Isaac Stephenson will not be terminated until July 11, 1946—twenty-one years after the death of Martha E. Stephenson, wife of Isaac Stephenson.

His will further provided, that if she should die leaving issue, without having appointed such person or persons, then the income from the trust estate should be used by the trustees for the support of such issue, and upon the termination of the trust the principal should go to such issue, *per stirpes* (R. 49).

Isaac Stephenson on May 12, 1917, also executed a deed of trust (R. 13) which by its terms was to terminate twenty-one years after the death of the trustor and his wife (R. 13). Isaac Stephenson died March 15, 1918. His wife, Martha E. Stephenson, died July 11, 1925. The deed of trust provided that Elizabeth S. Morgan, after the death of her father, should receive the income from a specified part of the trust property to be set apart for her by the trustees of the trust estate. If she should be living at the termination of the trust, she was to receive all of such part of such trust estate then in the possession of the trustees (R. 18). The deed of trust further provided that should she die prior to the termination of said trust, the trustees should pay the income from her part of the trust estate to the person or persons whom she might appoint by her last will and testament to receive such income during the term of the trust, and the principal upon the termination of the trust (R. 19).

The powers of appointment in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments, as follows:

Item 15 of the deed of trust (R. 26) and Item Twenty-Six of the will (R. 61) provide that whenever in the judgment of the Trustees, the trust property going to any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for*

*any other reason or reasons*, the trustees shall withhold, in their judgment, from any such beneficiary, the whole or any part of said trust property, whether income or corpus. (Emphasis ours.) The above language applies to any appointee under the exercise of the powers of appointment, such appointee being a beneficiary. By her will (R. 84, 85) Elizabeth S. Morgan exercised the above power of appointment by appointing her husband, J. Earl Morgan, to receive during his lifetime the income of all the property embraced within the power, he to pay out of such income the sum of Two Hundred ($200.00) Dollars per month to decedent's daughter during the continuance of the trust and after his death the principal to go to certain of her relatives.

The Commissioner for the purpose of assessment of the estate tax, included in the value of her gross estate the value of all the property passing under her exercise of said powers of appointment (R. 11).

The Commissioner's action was based upon the following provisions of the Revenue Act of 1926, as amended by Sec. 803(b) of the Revenue Act of 1932, 26 U. S. C. A. Sec. 411:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> • • •
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will • • •"

A Stipulation of Facts (R. 75-78) was filed in the case. The principal question in dispute before the Board of Tax Appeals and the Circuit Court of Appeals was whether the

powers of appointment under the deed of trust and the will of Isaac Stephenson are general powers of appointment, and the value thereof properly included under the provisions of Section 302(f) of the Revenue Act in the gross estate of Elizabeth S. Morgan. If those powers of appointment are general powers, under the terms of the will and deed of trust as construed by the law applicable thereto, then the value of the property passing by the exercise of such powers may be included in the value of her gross estate for taxation. If the powers as so construed are not general powers of appointment, the value of the property so passing cannot be so included.

The petitioner urged upon the Board of Tax Appeals that the law applicable to this case in determining the nature and extent of the powers of appointment is the law of Wisconsin, the state in which the property embraced in the power of appointment is situated and in which the donor and donee resided and the petitioner now resides. In support of his argument, petitioner cited the case of *Leser* v. *Burnet*, 46 F. (2d) 756, in which the Circuit Court of Appeals of the Fourth Circuit held that the law of the state having jurisdiction over the property should be looked to to determine the nature and extent of powers of appointment; and that under the law of Maryland the power of appointment was not a general power and the Commissioner of Internal Revenue could not include for taxation the value of the property in the gross estate of the decedent.

Relying upon that principle of law, petitioner cited to the Board of Tax Appeals the decision of the Supreme Court of Wisconsin in *Cawker* v. *Dreutzer*, 197 Wis. 98. That case involved a will and a testamentary trust concerning property located in the State of Wisconsin, in which will the powers of appointment were created by

words almost identical with the words used in the Stephenson will and deed of trust. The appointing power to Elizabeth S. Morgan in the Stephenson will (R. 49) is as follows, viz: "To the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament," and in the Stephenson deed of trust is in the following words, viz: "To such person or persons as she may appoint by her last will and testament." (R. 19.) The Supreme Court of Wisconsin held that those words did not create a general power of appointment in Wisconsin. The respondent did not contend before the Board of Tax Appeals that the federal law controlled; but acquiesced in the rule that the law of Wisconsin controlled. He insisted, however, erroneously, that the facts in the *Cawker* case differed from the facts in the instant case; that the donees of the power in the *Cawker* case were not possessed of the immediate life estate as was Elizabeth S. Morgan in the instant case. He urged, accordingly, that the *Cawker* case was not an authority in the case at bar. The fact is however that the holders of the life estates in the *Cawker* case *were* also the donees of the powers of appointment. The facts were, therefore, exactly similar in the *Cawker* case and the *Stephenson* case here.

Furthermore, the respondent, still conceding the rule that the law of Wisconsin controls, attacked the authority of *Cawker* v. *Dreutzer* as a holding. He argued to the Board, also erroneously, as we will show later, that the question of the effect of the power of appointment was not before the Wisconsin court in that case (R. 95, 96). Respondent accordingly insisted that the decision of the Supreme Court of Wisconsin was *dictum*.

The decision of the Board of Tax Appeals was rendered September 30, 1937 (R. 91; 36 B. T. A. 588). In its opin-

ion the Board said, in stating the rule of law applicable to the case (R. 94):

> "It has been held that in determining the nature and effect of powers, we look to the law of the state having jurisdiction. *Leser* v. *Burnet*, 46 F. (2d) 756; *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040, 1044."

That portion of the syllabus in *J. Earl Morgan, Executor*, v. *Commissioner*, 36 B. T. A. 588, immediately following the statement of facts, reads: "Held, under the *applicable law of the State of Wisconsin, etc.*" (Italics ours.)

The Board of Tax Appeals held that the case of *Cawker* v. *Dreutzer*, 197 Wis. 98, cited to the Board by petitioner as declaring the law of Wisconsin, was *dictum;* that the question of the nature and effect of the powers of appointment was not before that Court, and its decision was not authority (R. 95, 96)—thus adopting the contention of the respondent. The Board accordingly held that the powers were general powers of appointment and sustained the determination of the Commissioner.

The petitioner filed his petition for review in the United States Circuit Court of Appeals for the Seventh Circuit, and with it he filed various assignments of error (R. 103, 104). The petitioner made the same legal contentions before the Circuit Court of Appeals that he had made before the Board. *The respondent, however, presented an argument exactly contrary to his argument before the Board.* He told the Circuit Court of Appeals that the federal law controlled and not the law of Wisconsin, as he had contended before the Board, and as the Board had held was the applicable law.

The Circuit Court of Appeals entered judgment affirming the decision of the Board of Tax Appeals, but upon an entirely different principle of law than the Board had an-

nounced. The Circuit Court of Appeals held that the federal law controlled and under the federal law the powers of appointment in the will and deed of trust were general powers.

## Specification of Errors.

The petitioner assigns as error the following acts and omissions of said United States Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in affirming the decision of the United States Board of Tax Appeals which affirmed the determination by the Commissioner of Internal Revenue of the alleged deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan.

2. The Circuit Court of Appeals erred in sustaining the action of the Commissioner of Internal Revenue in including, in the value of the gross estate of Elizabeth S. Morgan, for federal tax purposes, the value of property passing under decedent's exercise of the powers of appointment.

3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the State of Wisconsin and the decision of the Supreme Court of that State to the contrary, are immaterial.

4. The Circuit Court of Appeals erred in failing to ascertain from said will and deed of trust the intention of Isaac Stephenson not to create therein general powers of appointment.

5. The Circuit Court of Appeals erred in not holding that the intention of Isaac Stephenson not to create general powers of appointment in said will and in said deed

of trust was controlling over any language used by him in said instruments pertaining to powers of appointment.

6. The Circuit Court of Appeals erred in failing to hold that the powers of appointment in the will and deed of trust were restricted by the authority given to the Trustees to withhold property from unworthy beneficiaries, thereby annulling any appointment made by the donee; and that therefore the donee did not have an unfettered, general power of appointment.

7. The Circuit Court of Appeals erred in holding that the appointees under the exercise of the powers of appointment by Elizabeth S. Morgan were not included within the term "beneficiaries" in the will and deed of trust; and also erred in holding that her power to appoint unworthy appointees was not restricted.

8. The Circuit Court of Appeals erred in accepting as a definition "uniformly recognized by Federal Courts" (R. 114, 115), the common law definition of a general power as pronounced by the Circuit Court of Appeals of the Ninth Circuit in *Johnstone* v. *Commissioner*, 76 F. (2d) 55, because there is no federal general common law. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 78.

9. The Circuit Court of Appeals erred in holding that even though under the law of Wisconsin the powers in the will and deed of trust were special powers, such fact was immaterial because the power in the Stephenson instruments satisfies the definition of a general power of appointment as that term is used in Sec. 302 (f) (R. 115, 116).

10. The Circuit Court of Appeals erred in holding that the decision in the case of *Burnet* v. *Harmel*, 287 U. S. 103, was applicable to this case.

11. The Circuit Court of Appeals erred in holding that the case of *Lyeth* v. *Hoey*, 305 U. S. 188, was applicable to this case.

12. The Circuit Court of Appeals erred in holding the case of *Cawker* v. *Dreutzer*, 197 Wis. 98, to be *dictum*.

13. The opinion of the Circuit Court of Appeals and its decision entered pursuant thereto are not supported by the facts in this case or the law applicable thereto.

14. The Circuit Court of Appeals erred in entering judgment affirming the decision of the United States Board of Tax Appeals, which affirmed the determination by the Commissioner of Internal Revenue of a deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan, deceased.

## SUMMARY OF ARGUMENT.

### I.

**The law of the State of Wisconsin, in which State is situated the property affected by the powers here involved, determines whether such powers are general powers of appointment, and that determination is binding on the Federal Courts and the taxing power of the United States. It is not a question of federal law.**

### A.

**The Circuit Court of Appeals held that the federal law controls and not the law of the State, and that the powers of appointment in question are general powers under the federal law.**

*Leser* v. *Burnet*, 46 Fed. (2d) 756.
*Whitlock-Rose* v. *McCaughn*, 21 Fed. (2d) 164.
*Lang* v. *Commissioner*, 304 U. S. 264.
*Sharp* v. *Commissioner*, 303 U. S. 624.
*Blair* v. *Commissioner*, 300 U. S. 5.
*Freuler* v. *Helvering*, 291 U. S. 34, 35.
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*Helmholz* v. *Commissioner*, 28 B. T. A. 165.
*Kendrick* v. *Commissioner*, 34 B. T. A. 1040.
*J. Earl Morgan, Executor* v. *Commissioner*, 36 B. T. A. 588 (1937).
*Estate of Frederick Shepherd* v. *Commissioner*, 39 B. T. A.—(5) (Jan. 1939); C. C. H. Board of Tax Appeals Service (1938) (p. 27950).

## II.

**Section 302 (f) Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932 provides that in the gross estate of the donee of a general power of appointment must be included all property passing from such donee by the exercise of said power.**

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or in money's worth."

## III.

**The Statutes of the State of Wisconsin define general and special powers.**

Wisconsin Statute (1935):

"232.05 General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special Power. A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made

are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

## IV.

**The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers.**

Section 232.05 and Section 232.06 of the Wisconsin Statutes (1935).

*Cawker* v. *Dreutzer,* 197 Wis. 98.

## V.

**By the Statute of Wisconsin an absolute power of disposition not accompanied by a trust given to the owner of an estate for life or for years shall be changed into a fee. * * * Under the negative meaning applicable to these affirmative words, this provision must be construed to mean that when such a power is accompanied by a trust, the estate shall not be changed into a fee. This provision is as follows:**

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts."

## VI.

**The decision of the Supreme Court of Wisconsin in Cawker v. Dreutzer, holding that a power of appointment in that case was a special power, is not, as urged by respondent and as declared in the opinion of the Board of Tax Appeals, a dictum. The Court's decision on that question was absolutely necessary to a determination of the very issue in that case.**

*Cawker* v. *Dreutzer*, 197 Wis. 98.

## VII.

**The powers in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments granting to the trustees at their discretion the right to annul any appointment made by the donee. These restrictions clearly stamp the powers of appointment as special powers.**

*Hepburn* v. *Commissioner*, 37 B. T. A. 459.

## VIII.

**Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.**

### A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from the instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment.

## IX.

**There is no valid federal definition nor legal standard of a general power of appointment; and there being also no binding decisions of federal courts defining powers of appointment there is consequently no federal law on that subject.**

### A.

(1) Neither Section 302(*f*) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulations 37 and 80 is unavailing.

(b) Even if it be held in this case that the law of the State controls only when the federal taxing act by express language or necessary implication makes it dependent upon the State law, the law of the State of Wisconsin must still be resorted to to ascertain the meaning of a general power of appointment in that State because there is no valid federal definition of that term.

(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, such definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.

## X.

The will of Isaac Stephenson was dated June 15, 1916. The deed of trust was executed May 12, 1917, and the fee to the property in question here was deeded to the trustees by him on the same date. Isaac Stephenson died March 15, 1918. The earliest federal revenue act in which property passing under the exercise of powers of appointment was taxed was enacted February 24, 1919. The attempt here to tax in the estate of Elizabeth S. Morgan the value of the property passing under the power of appointment to her, if held to be legal, is so arbitrary and capricious as to amount to a confiscation and offend the 5th Amendment.

*Nichols* v. *Coolidge*, 274 U. S. 531, 542.

## ARGUMENT.

### I.

**The law of the State of Wisconsin, in which State is situated the property affected by the powers here involved, determines whether such powers are general powers of appointment, and such determination is binding on the Federal Courts and the taxing power of the United States. It is not a question of federal law.**

#### A.

**The Circuit Court of Appeals held in the instant case that the federal law controls and not the law of the State, and that the powers of appointment in question are general powers under the federal law.**

In *Leser* v. *Burnet*, 46 Fed. (2d) 756, the power of appointment was created in an instrument of trust which provided that, upon the decease of the donee, the Trustee was to hold the property in trust for the use of "such person or persons as she by her last will and testament * * * shall have appointed to take the same." The donee duly exercised the power of appointment by her will. The Board of Tax Appeals affirmed the determination of the Commissioner of Internal Revenue including, for the purpose of taxation of the estate of the decedent donee, the value of the property passing under the exercise of her power of appointment. The question before the Circuit Court of Appeals for the Fourth Circuit was precisely the same which is presented here, viz: Could the Commissioner lawfully include the value of such property in decedent's estate for purposes of estate taxation? The Court held that

the question whether the power of appointment was a general power was to be determined by the law of Maryland, stating that (p. 760) "we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that State and relating to property there situate." The Court found that it was the settled law of the State that the power in question was not a general power; that under the law of Maryland the donee had no right under the power to exercise it in favor of her creditors, although such right was held in other jurisdictions to be a fundamental element of a general power of appointment. The donee, however, not having that right in Maryland, the power of appointment was special and not general.

The Court therefore held that the Commissioner could not include in the gross estate of the donee of the power, for taxation, the property passing under the power of appointment.

As to the objection urged by the Commissioner, to the Court's holding in that case (p. 761), that its effect "is to destroy the uniformity of operation of the statute, as the language used would unquestionably create a general power in most other States, the court answered: We do not think so. The Revenue Act provides for the inclusion only of property passing under general powers; and if a will or deed, as properly interpreted under the applicable law, creates a power which is not general but special or limited, it does not fall within the meaning of the Act."

The Circuit Court of Appeals in *Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164, a case under the same Federal Estate Tax as here held that where the property passing under the power was situated in New Jersey, the law of New Jersey controlled as to whether the power was a general power of appointment.

No application was ever made to this Court for a writ of certiorari to review the decisions of the Circuit Courts of Appeal in *Leser* v. *Burnet*, and *Whitlock-Rose* v. *McCaughn*. The decisions stand and have stood ever since their rendition, unquestioned by any decision of this Court.

Notwithstanding these holdings that the local law controls, the Circuit Court of Appeals held in the instant case, under the supposed authority of *Burnet* v. *Harmel*, 287 U. S. 103, that the law of the State of Wisconsin was immaterial; that the federal law controlled, and that under the federal law the powers of appointment in this case were general powers.

The Circuit Court of Appeals here, much in the same manner as did the Circuit Court of Appeals for the Ninth Circuit in the case of *Bank of America* v. *Commissioner*, 90 F. (2d) 981 (1937), extended the holding of this court in *Burnet* v. *Harmel*, *supra*, far beyond the meaning of that decision. In the *Bank of America* case three Judges sat at the hearing out of seven Judges constituting the Court of Appeals for that Circuit. The Court had before it the question as to whether the federal taxing power was bound by the California community property law in determining the nature and ownership of the property, the value of which was sought to be included in the gross estate of the decedent for purposes of estate tax assessment.

In the *Bank of America* case, the decedent and his wife were residents of California. Decedent took out certain policies of life insurance on which the premiums were paid out of community property. California Civil Code, Sec. 161a provides that the respective interests of the husband and wife in community property are present, existing and equal interests. On decedent's death his executor included

in the estate tax return only one-half of the amount of these policies in the gross estate. The Commissioner, however, included the full amount of the policies as being owned by the decedent. Decedent's executor contended that under the California community property law, the wife was the owner of one-half of the proceeds of the insurance policies, and therefore the decedent had no power of disposition or control at his death over the wife's half of such proceeds, and the estate could not be taxed for such half. The majority of the Judges sitting held, under a misapprehension of the meaning of *Burnet* v. *Harmel, supra,* (1) that the state law could control only when the taxing statute made its operation dependent on state law; (2) that there was nothing to indicate that the taxing statute (Sec. 302 (g)) made its operation dependent on California law; and (3) therefore the federal law controlled on the question as to whether the decedent was the owner of the proceeds of all the life insurance policies. The court therefore held that "the local law is immaterial," (*Bank of America* v. *Comm'r.*, 90 Fed. 2d, 983) and sustained the Commissioner's determination.

Less than a year subsequent to the above decision, the case of *Lang* v. *Commissioner,* 304 U. S. 264 (1938) came before the Circuit Court of Appeals for the Ninth Circuit. While that case was pending, three of the seven judges of the court certified propositions of law to this Court (C. C. H., Federal Tax Service (1938) Vol. 4, p. 9819), setting forth that the decision rendered by two of the judges out of three who sat in the case of *Bank of America* v. *Comm'r., supra,* did not represent the view of the remaining five Judges of the Court. They requested this Court to give instructions to the Circuit Court of Appeals for the proper decision of the case then before it—the *Lang* case. The certificate recited that these two judges had held that the

statutes of California relating to community property could not affect the interpretation of the Revenue Act by the Commissioner.

The facts in the *Lang* case, in which the judges of the Circuit Court of Appeals certified the propositions, were that Lang and his wife lived in the State of Washington (where community law obtains), until his death, at which time certain policies of insurance upon his life were in force. All the premiums upon the policies were paid for from community funds. The Commissioner of Internal Revenue determined that the proceeds from all such policies were part of the insured's gross estate and assessed accordingly. The assessment was upheld by the Board of Tax Appeals.

Pursuant to the certificate of the Circuit Court of Appeals, requesting instructions, this Court in *Lang* v. *Commissioner*, 304 U. S. 264, instructed the Circuit Court of Appeals that only one-half of the proceeds from the insurance policies became a part of the decedent's gross estate; that the estate could not be taxed for the other half of the proceeds of the policies which was owned by his wife under the provisions of the Community Property Law of the State of Washington. This Court ruled that the state law controlled.

The Circuit Court of Appeals in *Bank of America* v. *Commissioner, supra,* based its ruling that the local law was immaterial on the supposed authority of *Burnet* v. *Harmel*, 287 U. S. 103, which had held that the State law controlled only when the taxing statute makes its operation dependent on State law.

This Court, in *Lang* v. *Commissioner*, 304 U. S. 264, answered the request by the Judges of the Circuit Court of Appeals for instructions, and said that the holding

in the *Bank of America* case, that local law was immaterial, is "not accurate and conflicts with what we have said." (p. 267.)

In *Poe* v. *Seaborn*, 282 U. S. 101, the question before this Court was as to whether the Commissioner could tax against the husband the entire income received from community property owned by him and his wife in the State of Washington, or whether each should be taxed for one-half of the income on such property. This Court held that whether the interest of the wife in community income is taxable apart from the interest of the husband, was to be determined by the state law of Washington (p. 110), and that under that law the income of only one-half of the property could be taxed to the husband.

Another case in which the Court applied the rule that local law controls is *Blair* v. *Commissioner*, 300 U. S. 5. In that case a beneficiary under a trust assigned to third persons part of his income from the trust. In a case in a state court construing the will under which the trust was created, the Appellate Court of Illinois held that the trust was not a spendthrift trust and that the beneficiary's assignment was valid. The Commissioner of Internal Revenue contended that, notwithstanding the Court's decision the trust was a spendthrift trust, the assignment was invalid, that it must be ignored, and that the beneficiary was liable for a tax upon the entire income, regardless of the assignment, because he was still the owner of the income, as he had never legally assigned it. This Court held that the decision of the Appellate Court of Illinois was binding upon the Federal taxing power, and that the beneficiary could not be taxed upon the income which he had assigned. The Court said that the question of the validity of the assignment is a question of local law. The beneficiary was

a resident of Illinois and his disposition of the property in that state was subject to its law. "By that law, *the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest, in whole or in part, are to be determined. The decision of the State Court upon these questions is final.*" (p. 9) (Emphasis ours.)

In *Sharp* v. *Commissioner*, 91 F. (2d) 802, the Circuit Court of Appeals for the Third Circuit sustained an assessment by the Commissioner of Internal Revenue against decedent's estate on property which the Commissioner determined was owned by the decedent at the time of his death. Decedent's executors contested the assessment and claimed that the property was owned by a trust estate created by the decedent. Such ownership had been decided by the decree of a State Court of competent jurisdiction which had held that the decedent did not own the property but that it was owned by the trust estate. The reason given by the Circuit Court of Appeals for sustaining the assessment and disregarding the decision of the State Court, was that the decision was binding only upon distributees of the estate, *but it could not bind the taxing power of the Government.* On certiorari granted, this Court, in *Sharp* v. *Commissioner*, 303 U. S. 624 (1938), reversed the decision of the Circuit Court of Appeals, citing *Freuler* v. *Helvering*, 291 U. S. 35, 43, 45; *Blair* v. *Commissioner*, 300 U. S. 5, 9, 10.

In *Freuler* v. *Helvering, supra*, this Court held that the decree of a state court holding that annual deductions for depreciation of trust property should have been taken from gross income before making distributions to beneficiaries, establishes the rights of the parties, and

permits deductions from distributable income on account of depreciation. Further, that this order of the state court governed the distribution and was effective to fix the amount of the taxable income of the beneficiaries. The Circuit Court of Appeals held that the decision of the State Court was not conclusive in the administration of the Federal Revenue Act. This Court overruled the Circuit Court of Appeals, and held that the decision of the State Court established the law of California as to the property rights of the beneficiaries; and that it must control in applying an income taxing act (p. 45).

The decisions of this Court in *Lang* v. *Commissioner*, *Sharp* v. *Commissioner*, *Poe* v. *Seaborn*, *Blair* v. *Commissioner*, and *Freuler* v. *Helvering*, show the intention of this Court not to have the meaning of its language in *Burnet* v. *Harmel*, 287 U. S. 103, enlarged beyond the scope intended by the Court in deciding that case on the facts before it.

We contend that the rule announced in the above cases—that the State law controls—is strictly applicable to the instant case, and that the Circuit Court of Appeals erred in holding otherwise.

The Circuit Court of Appeals in the instant case also cited *Lyeth* v. *Hoey*, 305 U. S. 188, as authority for its holding that the question here was whether the property passed under a general power of appointment within the meaning of Section 302 (f) of the Revenue Act, and that the question was one of federal law (R. 118).

In *Lyeth* v. *Hoey* the taxpayer was an heir of the decedent whose will had been offered for probate in Massachusetts. The taxpayer began proceedings to contest the probate of the will on certain named ground. A com-

promise agreement was thereupon entered into between the taxpayer and the legatee for the bulk of the estate, by the terms of which compromise the taxpayer received certain cash and property. The Commissioner assessed the value of the taxpayer's receipts under the compromise as income. The taxpayer filed suit for a refund, relying upon Section 22 (b) (3) of the Revenue Act of 1932, which *exempts* from income tax the "value of property acquired by • • • inheritance" • • •. The taxpayer contended that the property he received was within said statutory exemption. The United States Circuit Court of Appeals for the Second Circuit declared the rule to be that whether the property was exempt from such tax depended upon the law of the jurisdiction under which the taxpayer received it; that under the Massachusetts decisions the taxpayer received the property by purchase and not by inheritance, and therefore it was not within the statutory exemption of the Revenue Act. The Supreme Court reversed the judgment of the Circuit Court of Appeals, and held that the application of the Massachusetts rule was erroneous.

An entirely different question was presented in *Lyeth* v. *Hoey* from the question presented in the other cases cited —*Lang, Sharp, Poe, Blair* and *Freuler*. The other cases cited dealt only with the *taxation* provisions of the Revenue Act. In the *Lyeth* case, the question before the Court was whether or not certain property was within the *exemption* provision of the Act. Clearly, the Federal Courts, in construing a provision in the Revenue Act for certain exemption from its operation, are not bound by state law in determining what property falls within such exemption. State law clearly would have no jurisdiction to determine that question. It is when Congress seeks to *impose* a tax upon property or a property right of the taxpayer, and the law of the State in which the property is situated has

determined that such property or property right does not exist or does not belong to the taxpayer, that the state law must control; and such state decision is binding on the taxing power of the Government. The rules for construction as between an exemption provision and a taxing provision are quite different. In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their operations so as to embrace matters not specifically pointed out, and in case of doubt they are construed most strictly against the Government and in favor of the citizen. *Gould* v. *Gould,* 245 U. S. 151.

Under the authority of the decision of the Supreme Court of Wisconsin, Elizabeth S. Morgan did not own general powers of appointment and the Commissioner could not, therefore, assess a tax against her under the claim that she did own them.

In Paul on "Selected Studies in Federal Taxation," Second series (p. 12), the author states:

> "The Federal estate tax consciously incorporates state law by its reference to 'a general power of appointment' in Sec. 302(f) * * *"

The principle that the law determining whether a power of appointment is a general power is the law of the state in which the property is situated has been announced also by the Board of Tax Appeals in *Helmholz* v. *Commissioner,* 28 B. T. A. 165; *Kendrick* v. *Commissioner,* 34 B. T. A. 1040; *J. Earl Morgan, Executor* v. *Commissioner,* 36 B. T. A. 588 (the instant case); and *Estate of Frederick Shepherd* v. *Commissioner,* 39 B. T. A.—(5) (Jan. 1939), C. C. H. Board of Tax Appeals Service (1938) (p. 27950).

It is the established law of the Federal Courts that the question whether a power of appointment has been *exercised* by a donee, is a question upon which State law is controlling. *Johnstone* v. *Commissioner*, 76 Fed. (2d) 55; *Old Colony Trust Co.* v. *Commissioner*, 73 Fed. (2d) 970; *Blackburn* v. *Brown*, 43 Fed. (2d), 320.

There is no distinction in law between the authority of a state court to determine whether a donee has *exercised* a power of appointment and its right to determine the question as to whether a power of appointment is a general or special power. We contend that in theory and upon reason the questions involved are the same in law. The donee's dispositive rights over the property determines whether he has a general power of appointment, and those same rights determine whether or not he has exercised the power. If the latter question is admittedly under the control of the State then the question of the nature and effect of the power should be under the same control.

## II.

**Section 302 (f) Revenue Act of 1926 as amended by Section 803 (b) of the Revenue Act of 1932 provides that in the gross estate of the donee of a general power of appointment must be included all property passing from such donee by the exercise of said power.**

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or

enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or in money's worth"; * * *

The theory upon which Congress enacted the above statute was that the decedent whose estate was being taxed thereunder held in his lifetime such an authority and control over the property embraced in a general power of appointment as to give him the absolute power of disposition, practically equivalent to that of the owner of the property.

When the first bill taxing powers of appointment was reported to the House of Representatives, the report of the Ways and Means Committee was as follows, viz:

H. R. Rep. No. 767, 65 Cong. 2d Sess. (1918) 21-22.

"There has also been included in the gross estate the value of property passing under a general power of appointment. This amendment, as well as that preceding, is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is with respect to the disposition of the property at his death in a position not unlike that of its owner. The possessor of property has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority."

In other words, the Ways and Means Committee considered this power ("property in a very real sense,") (*Whitlock-Rose* v. *McCaughn*, 15 F. 2d 591, 592) as being owned by the donee exactly like a building, an automobile or a share of stock; property with which the donee could have paid his debts and which he could have made his own by appointing it to his executor or to his creditors.

## III.

**The Statutes of the State of Wisconsin define general and special powers.**

**(Wisconsin Statutes 1935)**

"232.05 General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will or charge of the lands embraced in the power, to any alienee whatever."

"232.06 Special Power. A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

The exercise of the powers of appointment by Elizabeth S. Morgan did not effect an alienation *in fee* of the property embraced in the powers. The fee to the property in the Isaac Stephenson estate was in the trustees under the deed of trust and had been so held by them since May 12, 1917. The fee, therefore, could not be alienated by Elizabeth S. Morgan through the exercise of her power of appointment.

Furthermore, when Isaac Stephenson granted the powers of appointment he reserved to himself the naming of the line of descent should the donees fail to exercise the powers. Under the authority of *Cawker* v. *Dreutzer*, 197 Wis. 98, by this reservation he gave to Elizabeth S. Morgan an estate less than a fee, subject to be defeated by the exercise of the power of appointment. He did not grant to her an absolute estate in the property nor the absolute disposition of it. Therefore, they were not general powers of appointment.

## IV.

**The Supreme Court of Wisconsin has held that powers of appointment similar to those in question here are special powers and not general powers.**

Section 232.05 and Section 232.06 of the Wisconsin Statutes (1935).

In *Cawker* v. *Dreutzer*, 197 Wis. 98, heretofore referred to on page seven of this brief, the testator created a trust estate of the residue of his property. He directed his trustees to so manage the estate that it would produce a safe and reasonable income, which they were to pay to his two daughters during their lifetime, and after their death to pay over the principal to such persons "as they shall by last will and testament appoint" (p. 108, 109). Leonore H. Cawker, one of the daughters of testator, began an action in which she prayed the Court to decree that the power of appointment merged with her life estate and that such merger gave to her a complete and absolute title to the property (p. 133).

The court held that the estate was given to the trustees to hold for the life of the beneficiaries; that the trustees were to pay out only the income to the beneficiaries; that the testator's intent was manifest and that he desired to put the corpus beyond the reach of the legatees, so that they might have an assured income for life. "So he tried to put it beyond their power to dispose of the estate during their life. While he gave an absolute power of appointment, he reserved to himself the naming of the line of descent should they fail to exercise the power, and thus gave to appellant (the daughter) a vested remainder subject to be defeated only by the exercise of the powers of appointment. 23 R. C. L. 511; *Roberts* v. *Roberts*, 102

Md. 131, 62 Atl. 161, 1 L. R. A. N.S. 782 and note. *This should be held to effectively prevent an absolute estate in such legatees.* If not, the testator's will would be frustrated and his benevolent design set at naught. *Bradbury v. Jackson*, 97 Me. 449, 54 Atl. 1068. *The powers of appointment are not the powers of absolute disposition of the estate.*" (Emphasis ours.) (pp. 133-134.)

The Court further held that "nothing in the will of the testator here indicates that the daughters were ever to come into the possession of any part of the corpus of the estate (p. 134)"; also that "the powers of appointment did not give the power of disposition to the holders of the life estate (p. 135)"; also "neither is the power a general power as defined in Section 232.05, but is a special power under Sub. (2), Section 232.06 because it embraces an interest less than the fee (p. 135)."

## V.

**By the Statute of Wisconsin an absolute power of disposition not accompanied by a trust given to the owner of an estate for life or for years shall be changed into a fee. * * * Under the negative meaning applicable to these affirmative words, this provision must be construed to mean that when such a power is accompanied by a trust, the estate shall not be changed into a fee. This provision is as follows:**

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case

the power should not be executed or the lands should not be sold for the satisfaction of the debts."

These are affirmative words, which also convey a negative meaning. As said by this Court, in *Marbury* v. *Madison*, 1 Cranch, 138, 174, "Affirmative words are often in their operation negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them or they have no operation at all."

In applying this principle to Section 232.08 of the statute in question, it is plain that the effect of the statute is to declare that an absolute power of disposition *accompanied* by a trust shall *not* be changed into a fee when given to the owner of a life estate.

It would therefore appear that the law of Wisconsin is that an absolute power accompanied by a trust is not equivalent to absolute ownership so that the property passing thereunder may be taxed under Section 302 (f) of the Revenue Act. It is not a general power of appointment.

## VI.

**The decision of the Supreme Court of Wisconsin in Cawker v. Dreutzer, holding that a power of appointment in that case was a special power, is not, as urged by respondent and as declared in the opinion of the Board of Tax Appeals, a dictum. The Wisconsin Court's decision on that question was absolutely necessary to a determination of the very issue in that case.**

The contention that the decision in *Cawker* v. *Dreutzer*, 197 Wis. 98, is *dictum* is without foundation. It was first presented by the respondent before the Board of Tax Appeals, which adopted it in its decision (R. 96). It was

stated as a finding by Judge Lindley of the Circuit Court of Appeals, who concurred in the majority opinion (R. 123). The argument that the *Cawker* case is not a holding is based upon the unsupported assertion that the question as to whether the powers of appointment were general powers was not before the Wisconsin court. The charge of *dictum* completely ignores the words of the Supreme Court of Wisconsin in its opinion. There it recited (p. 129) the questions before it for consideration and among others: "(3) *Whether the powers of appointment in the will were valid, and, if so, their effect.*" (Emphasis ours.)

The charge of *dictum* also ignores the statement of the Court in its opinion as to the pleadings (p. 133) as follows:

> "It is claimed by the plaintiff respondent that having the power of appointment whereby they may dispose by will of the whole estate absolutely and having a life estate, the two estates merge, and the daughters had complete and absolute title in the property."

It is insisted, in effect, by the respondent that the Supreme Court had no such pleading or claim of the plaintiffs before it at the time of the hearing or of the rendition of the judgment in the case. Also, that the only attempt of either of the donees to present such a pleading or claim to the court was in a pleading known in Wisconsin practice as Application for Review of Judgment, *filed after the case had been tried*, and which the court refused to pass upon because it was presented too late. It is true that such a request was made after the rendition of judgment, but that application was only a *repetition* of the first complaint filed by the plaintiff when the suit was started.

An examination of the files in this case in the office of the Clerk of the Supreme Court of Wisconsin shows this

clearly. The transcript of the record filed in the Supreme Court at the August Term, 1928, contains the original complaint of the plaintiff in which the following language appears (p. 5):

> "Therefore, this plaintiff demands the judgment of the Court in the premises of adjudging and declaring: (1) Whether the plaintiff shall not be deemed, by virtue of the *power* given to her by said will, to possess an absolute power of disposition of her half of the residuary estate, within the meaning of the statutes of the State of Wisconsin; (2) whether, under the provisions of the State of Wisconsin, and by virtue of the absolute power of disposition given to her, *and as grantee of the power*, she is not entitled to an *absolute fee* in the one-half of the residuary estate of E. Harrison Cawker, Deceased." (Italics ours.)

In the same transcript (p. 24) appears the plaintiff's *amended* complaint, in which the above requests are also made in the identical language.

The files in the office of the Clerk of the Supreme Court also contain the brief of Leonore H. Cawker, the plaintiff in the case, in which appears (p. 15) the following, viz:

> "The respondent, Leonore H. Cawker, requested both in her complaint, and in the proposed findings, that the court adjudicate whether this plaintiff shall not be deemed *by virtue of the power* given to her by said will to possess an absolute power of disposition of her one-half of the residuary estate. * * *
>
> "This request is *repeated* in her application for a review, served and filed herein." (Italics ours.)

The "absolute power of disposition" prayed for in the complaint is a synonym for "general power of appoint-

ment." 21 R. C. L., Sec. 3, p. 774, citing *Thompson* v. *Garwood*, 3 Whart. (Pa.) 287.

It thus appears, as the Supreme Court of Wisconsin stated specifically in its opinion, that the plaintiff in her complaint and amended complaint, both filed prior to the hearing, had prayed for a decision on the exact question which the court determined by its decision.

The above recital in Leonore Cawker's brief that "this request is *repeated* in her application for review" is for the purpose of advising the Court that she had failed to perfect an appeal from the decree of the Circuit Court *until subsequently to the appeal perfected by another defendant*, Hortense Cawker Merrill.

The Practice Act of the law of Wisconsin at that time provided that if one of several joint or several defendants attempts to appeal, after another defendant had appealed, the latter defendant so appealing must, *in a petition for review of the judgment, repeat the allegations of her petition*, in order to present her exceptions to the Supreme Court. It was this *second and repeated request*, made by Leonore Cawker after judgment, in her petition for review of judgment, which the court *refused to entertain*. Due consideration given to the words of the Court in *Cawker* v. *Dreutzer* would have shown how unfounded was the charge of *dictum* in this case.

It was necessary to adopt this unusual procedure in order to present the actual pleadings in *Cawker* v. *Dreutzer* to this Court but we felt it only fair to ourselves and to the Court that it should be told the exact situation.

## VII.

**The powers in the will and deed of trust of Isaac Stephenson were restricted by the terms of those instruments granting to the trustees at their discretion the right to annul any appointment made by the donee. These restrictions stamp the powers of appointment as special powers.**

This clearly appears from the decision in *Hepburn* v. *Commissioner*, 37 B. T. A. 459.

The petitioner has assigned as error the failure of the Circuit Court of Appeals to hold that the authority vested in and the directions given to the Trustees by the will and deed of trust of Isaac Stephenson, to annul any appointment made by the donee, was a positive restriction upon the power of Elizabeth S. Morgan to appoint.

This restriction is implicit in the very grant of the power to her. Item 15 of the deed of trust (R. 26) and Item 26 of the will (R. 61) provide that whenever in the judgment of the Trustees the trust property going to any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for any other reason or reasons*, the Trustees shall withhold, in their judgment, from any such beneficiary, the whole or any part of said trust property, whether income or corpus (Emphasis ours). By reason of this right of the Trustees to nullify the exercise by the donee of the powers of appointment they are unquestionably special powers and not general powers. The will of the donee was fettered, from the very inception of the powers by the directions to the Trustees. Her power to appoint was restricted by the authority invested in the Trustees. She might make the appointment only to persons

meeting the approval of the Trustees. The powers, therefore, were special powers and not general powers of appointment.

It cannot be answered that the Trustees have not objected to the appointees selected by Elizabeth S. Morgan and may never object. In *Hepburn* v. *Commissioner, supra*, the will provided that the donee could not appoint without the written approval of the testator's trustees. The Board of Tax Appeals held in that case that *although the Trustees had given their written approval to a number of appointments made by the donee, including the last appointment under which the Commissioner of Internal Revenue sought to include the value* of the property passing thereunder, still the provision compelling her to obtain their approval rendered her will subject to theirs. Therefore, the power of appointment was not a general power.

The test in the instant case as in the *Hepburn* case is *not* whether the Trustees have or have not objected to appointees of the donee. The element that destroys the powers of appointment as general powers is the fact that the trustees *have the authority* to annul the exercise, defeat the appointment and therefore in reality, to select the appointees.

In the instant case, the right of the trustees to withhold property, *for any reason*, from an appointee is in effect the right to defeat the appointment, and that right exists and will continue to exist for seven years. It is immaterial whether the trustees *ever* withhold the property. It is their *power* to withhold the property which limits the will of the donee. The powers of appointment here are, therefore, not "unfettered." (*Leser* v. *Burnet*, 46 Fed. (2d) 756.)

The restriction upon the powers of appointment, through the right of the trustees to withhold property applies to

the appointees in whose favor the power may be exercised by the donee, and the provision regarding the withholding of property embraces any appointee in whose hands the property, in the judgment of the trustees, might be dissipated or improvidently handled, through intemperate or spendthrift habits, lack of business capacity, or subjection to the injurious influence of others affecting business capacity, *or for any other reason or reasons.* The judgment of the trustees is final and conclusive.

The restriction is in effect an actual direction by the donee's father to her, that the class described by him in the above words as being disqualified, must not be appointed by her in the exercise of her power of appointment. His intent to restrict her power is unmistakable.

The fact that the determination of the authority of the trustees to nullify the donee's exercise of the power, is confided to the judgment of the trustees, does not argue in any wise that there is no limitation of the power of appointment. The donee exercising the power is under the same restrictions in respect to that exercise as are the trustees in determining the propriety of the exercise. It is not a situation where the grant of power may be exercised by the donee regardless, with, for instance, a succession of appointees, each one after the other, who have been declared by the trustees to be of the forbidden type. The provision is a sensible one and binding upon Elizabeth S. Morgan *to the same extent as upon the trustees. The donor obviously in the limitation stated was speaking to Elizabeth S. Morgan in the same voice with which he was speaking to the trustees.* This is not the case of a grant of unlimited power of appointment to Elizabeth S. Morgan subject to defeasance at the will of the trustees, although even this would have given her something very short of

absolute or fee simple title. It is a case in which she, in exercising her power as donee, may do so only for the benefit of the class of proper appointees so described by her father, with no thought that she would make an appointment or a series of appointments, each one in turn to be ruled out by the trustees until one appointee happened to avoid the limitations.

There is no doubt that the trustees may withhold the property appointed to unworthy appointees exactly the same as they may withhold it from other unworthy beneficiaries, who receive it under other provisions of the will and deed of trust.

This provision of the trust deed requires the trustees to pay the income to such person or persons as are appointed to receive the income, and, at the termination of the trust, to transfer the property to such person or persons as are appointed to receive the principal. The Circuit Court of Appeals commented upon the fact that the trust deed makes no provision defining the appointee's interest in case he should die intestate. No more does the trust deed make provision for the disposition of the appointee's interest in case he should die testate. In fact, no provision is made as to what should happen in case the appointee should die before coming into the enjoyment of the appointed property. This failure to include such a provision certainly does not make the appointee any less a "beneficiary" within the meaning of Item 15 (R. 26).

If the appointee should die before coming into the enjoyment of the appointed property, regardless of whether it should be held that the appointed property should then be paid to his legatee if testate, or his issue or heirs if intestate, or be held to lapse and the property be required to be distributed among the remaining parts, the appointee

would nevertheless be a beneficiary within the meaning of the law and the intent of the will and deed of trust. His legatees, heirs, issue or the beneficiaries of the remaining parts respectively, as the case might be, would take his place as beneficiaries under the trust deed within the meaning of Item 15. At the time of distribution, on the termination of the trust, a duty will devolve upon the trustees to determine in each case, in order to carry out the purpose of the trustor, as set forth in the preamble of the trust deed, and in Items 15 (R. 26) and 26 (R. 61) thereof, whether the beneficiary, however designated, is worthy.

An examination of the trust deed reveals that Isaac Stephenson used the word "beneficiary" in only four items of his will, including Item 15. The other items are Items 12 (R.26), 18 (R. 28) and 23 (R. 32). We find no express provision of the creator of the powers in any of these items, or anywhere in the deed, distinguishing between beneficiaries named by him and appointees named by his donees. There are no reasons for believing that he intended to distinguish between the beneficiary named by him and the beneficiary (appointee) named by his donees, in addition to the fact that no such provision is made in the trust deed.

The trust was to continue for twenty-one years after the death of the grantor and his wife, the latter dying in 1925, and, as his children were all given powers of appointment, the grandchildren would not be protected in the manner contemplated by him unless the appointees were included in Item 15, since the children who were donees of the powers could appoint their own children, or as to those who had none, their brothers and sisters, or their nephews and nieces.

The Circuit Court of Appeals held that Isaac Stephenson intended to differentiate between beneficiaries and ap-

pointees to the extent that the property might be withheld by the trustees from the "beneficiaries" *but not the appointees.* We understand the theory of the Court on this point to be that if a donee who, of course, is a named beneficiary, one of trustor's children, should be found unworthy and die, exercising his power of appointment, the withheld property could not be paid to the appointee, as such, since by the deed such trust property must be paid to the donee's issue as such. Insofar as there is this limitation on the exercise of the power, supporting our contention that it is a special power, we should not object. We think this fault appears in the argument of the Court: it fails to distinguish between an effective and an ineffective appointment. Of course, the appointee under an ineffective appointment could never be a beneficiary under such appointment. Thus, a named beneficiary who dies before the trust terminates, could only have had income withheld. Such accumulated income is the withheld property which must be paid to his issue, or, if none, be distributed among the other parts. The principal and subsequent income of his trust part was never property which the trustees could have paid to him and so could not be as to him "withheld property." The principal could not be withheld until the time for distribution arrives and the distributee is known. Until the distributee is known, the trustees could not determine whether he is worthy or unworthy. Therefore, the appointee of such donee will take the property included in the trust part appointed, being income after the appointment and principal, but withheld property, being income before the appointment, will go to the issue of the donee, and, in default of issue, to the other parts. To say that an appointee cannot be a "beneficiary" as to property withheld from him, is not to say that he cannot be a beneficiary with respect to property as to which the appointment takes effect. As will be noted, even as to withheld prop-

erty, if the unworthy beneficiary leaves no issue, such withheld property goes to the other remaining parts, the beneficiaries of which may be the appointees of worthy beneficiaries. So, whether or not the trustor eliminated the appointees to withheld property yet he did not exclude them as to property with respect to which the appointment takes effect.

The Circuit Court of Appeals says in its opinion that when a named beneficiary dies intestate, the trust deed provides that income shall be paid to issue then surviving, and, at the termination of the trust, the trustees shall transfer all property then in their possession to then surviving issue. The Court evidently refers to the provisions of the deed corresponding to the fourth paragraph of Item 10 of the Trust Deed (R. 23, 24) providing for the contingency of death. It will be noted that by the proviso contained in this paragraph, if there should be no issue the income and property is to be distributed equally among all the other then existing remaining parts.

The above analysis clearly shows that the word "beneficiaries" used by Isaac Stephenson in his will and trust to denote the objects of his bounty from whom property should be withheld by his Trustees if they proved unworthy was intended to include the appointees under the power of appointment. The Circuit Court of Appeals, however, held that appointees were not embraced in the word "beneficiaries" (R. 119). In other words, the Court reached the astonishing conclusion that Isaac Stephenson, while using every means within his power, through provisions in his will and deed of trust to prevent his estate from being dissipated by unworthy children, grandchildren or other relatives designated in his will and deed of trust, was nevertheless perfectly willing to have his estate dissipated by unworthy, spendthrift or wastrel *appointees* whose appoint-

ment by his daughter he did not even attempt to prevent. It is inconceivable that he had any other intent than to include unworthy "appointees" among his unworthy "beneficiaries" whose appointment could be defeated by his trustees.

It is well settled in law that an "appointee" under a power of appointment in a will or trust is also a "beneficiary" thereunder. 69 C. J., p. 851, Sec. 1961; *Lederer* v. *Pearce*, 262 Fed. 993, 997; Affirmed. 266 Fed. 497.

## VIII.

**Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.**

### A.

**(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.**

**(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition**

**(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment.**

In *Cawker* v. *Dreutzer*, 197 Wis. 98, the Court in holding that the powers of appointment in the Cawker will were special and not general powers, said (p. 133):

> "The courts in this country have uniformly tried to give effect to the intent of the testator, where that

intent is ascertainable, unless it is contrary to some statute or other positive law. Here the estate is given to trustees to hold for the life of the beneficiaries. They are to invest the corpus and pay over the income only. The testator's intent is manifest."

Likewise, there can be no question of the same intent on the part of Isaac Stephenson to prevent his children to have any ownership or control over his estate until the termination of his trusts. In the opening paragraph of his will (R. 38) he says:

> "It is my chief desire by this will to insure an adequate and comfortable support for my wife during the remainder of her life and to relieve her of all the cares and uncertainties of business affairs, and to provide for the distribution of my estate equally among all my children and the issue of my deceased children, such issue taking by right of representation, as I have hereinafter provided."

He also stated in the opening paragraph of his deed of trust (R. 13):

> "It has been my observation that many widows and children have been unable to properly preserve the principal of the fortunes they have inherited, and I desire to provide for the support of my beloved wife, Martha E. Stephenson, and my children and grandchildren so that my wife shall always have a sufficient income and shall not be wholly dependent upon what she may receive from my estate, and so that my children and grandchildren shall be insured a comfortable living for many years after my death; and also to make ample provision for myself during my life and before the infirmities of old age shall have dulled my intellect."

It is thus manifest that, as in the *Cowker* case and in the *Hepburn* case, it was the intent of Isaac Stephenson to put the corpus of his estate beyond the reach of his wife and children, five of whom were daughters, so that they might have an assured income and not be reduced to penury through their inexperience in handling business and financial matters, if given immediate possession and control of his estate.

The language quoted above from the will and deed of trust here is eloquent proof of his intention not to give to his children a general power of appointment, which is equivalent to "outright ownership" (*Fidelity Trust Co.* v. *McCaughn*, 1 Fed. (2d) 987, 988), but to withhold such ownership from them for years.

The intention of Isaac Stephenson controls over any definition or technical words in the instruments before the Court.

The fact that Isaac Stephenson in his will and deed of trust used the words "to such person or persons as she may appoint" (R. 19) which words may have a technical legal signification, does not outweigh the evidence of the testator's (trustor's) intention not to employ the words or terms in their technical sense. If that intention does appear from the instruments, it is the duty of the Court to construe the words, not in their technical sense but *so as to effectuate his intention*. 69 C. J. 76; *Lyons* v. *Lyons*, 233 F. 744, 746.

If it should be held that petitioner is foreclosed from showing the intent of the testator (trustor), on the ground that his intent is immaterial, inasmuch as the words used by him have a technical meaning which cannot be changed by his intent, such a holding would deprive petitioner of his property without due process of law in violation of

the Fifth Amendment to the Constitution of the United States. *Heiner* v. *Donnan*, 285 U. S. 312.

The value of the property passing under the powers of appointment exercised by Mrs. Morgan cannot be included in her estate for taxation (Sec. 302(f) Revenue Act) unless the powers are general powers of appointment. The powers here are not *general powers of appointment* unless Isaac Stephenson *intended* to grant to his daughter as donee a general power of appointment and thus to give her at his death the immediate and complete ownership of her part of his estate. But such a conclusion is contradicted by every provision of his will and deed of trust which instruments, like the Levi Morton will construed in *Hepburn* v. *Commissioner*, 37 B. T. A. 459, are "replete with provisions clearly indicating his desire," (p. 466) that his children should have neither the ownership nor the control of his property until twenty-one years after the death of the trustor and his wife.

The intention of the testator and trustor must be ascertained from the language of the instruments.

> "Powers are to be construed in accordance with the intention of the donor or grantor, as determined under the rule relating to the construction of instruments generally." 49 C. J. p. 1260.
>
> "A power cannot be extended beyond its express terms, *and the clear intention of the donor.*" Ibid. (Italics ours.)

The Circuit Court of Appeals in this case recognized this rule of law, but contented itself with simply examining the alleged intention of the testator *not* to restrict the general power of appointment, and the Court decided that he had not restricted it. (R. 118, 119, 120, 121.)

In *Smith* v. *Bell*, 6 Pet. 68, 75, Chief Justice Marshall said:

> "The first and great rule in the exposition of wills to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

This Court has also held that the same rule applies to the construction of trusts:

> "They are rights arising solely out of the intent of the party who created them and therefore such intent could be the only guide in the execution of them." (*Green* v. *Green*, 90 U. S. 486, 490.)

The petitioner has assigned for error that the Circuit Court of Appeals did not, as was held necessary in *Hepburn* v. *Commissioner*, 37 B. T. A. 459, ascertain the intention of the testator, "which is controlling" (p. 465) in the determination of the question as to whether the power of appointment is a general or a special power.

The only ground upon which this tax can be sustained is that Isaac Stephenson granted, and *intended* to grant to his children, immediately upon his death, the equivalent to complete ownership of his estate, by investing them with general powers of appointment.

Fifteen years prior to Mrs. Morgan's death, he had conveyed his estate to trustees and had inserted in his will and deed of trust provisions giving to them the entire management and control of all of his property, the same "as I could do if I still were the sole owner of said trust property" (R. 29).

He recites in great detail the powers granted to his trustees in his deed of trust (R. 28, 29, 30, 31) and in his will

(R. 60, 61, 62, 63, 64, 65). Among other powers was the power to the trustees to withhold from unworthy appointees property which his donees had appointed to unworthy beneficiaries (R. 26, 27, 61). That is one of the powers which he instructs his trustees to perform the same as he could do if he were still the sole owner of the property (R. 29, 64).

Can it be argued, without a reduction to absurdity, that Isaac Stephenson conveyed to his trustees not only the legal title to his property, granting also to them absolute powers of control, management and disposition thereof, and that he, in the same document and almost in the same paragraph, granted to Elizabeth S. Morgan and his other children and intended to grant to them the absolute power of disposition over the same property, conveying to them at his death the equivalent of ownership thereof. If he did such a thing it would be a grave reflection upon his sanity.

## IX.

**There is no valid federal definition nor legal standard of a general power of appointment; and there being also no binding decisions of federal courts defining powers of appointment there is consequently no federal law on that subject.**

### A.

**(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.**

**(a) The attempt to establish this definition and create a legal standard by promulgation of Regulations 37 and 80 is unavailing.**

**(b) Even if it be held in this case that the law of the State controls only when the federal taxing act by express**

**language or necessary implication makes it dependent upon the State law, the law of the State of Wisconsin must still be resorted to to ascertain the meaning of a general power of appointment in that State because there is no valid federal definition of that term.**

**(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, such definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.**

The Treasury Department, apparently seeking to remedy the lack of definition of general power of appointment in the Revenue Act, promulgated in 1919 Treasury Regulation 37, Article 30, which purported to define a general power as "one to appoint to any person or persons in the discretion of the donee." We contend that the Treasury Department, in promulgating this regulation, assumed legislative power by attempting to add to the provisions of the Revenue Act which Congress alone has the constitutional power to do. Congress has not taxed the exercise of a special power of appointment. Under the Constitution, Congress alone has the power to tax it. The department cannot tax it by a regulation. Congress did not delegate to the Commissioner the authority to extend by regulations the provisions of the Revenue Act. The Constitution vests in Congress and in Congress alone the authority to make the laws, and the legislative authority thus derived from the people cannot be delegated. Hence, Congress cannot approve or adopt a regulation which purports to make law. As said by a distinguished author quoting *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 134:

"The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations and to carry into effect the will of Congress as expressed by statute." Hughes on Federal Death Tax, p. 40, Sec. 18.

To illustrate the attitude of the courts toward the ever growing number of regulations pertaining to the taxing statute, which regulations clearly exceed the power of the Commissioner or Secretary of the Treasury, we need only call the Court's attention to the case of *Commissioner of Internal Revenue* v. *S. F. Shattuck*, 97 F. 2d 790. The Court held that Article 19 of Regulation 79 should be ignored because it exceeded the power of the Commissioner and being so, it was invalid.

We submit that Regulation 37 (and its succeeding Regulation 80) are attempts by the Commissioner to add a legislative provision to Section 302 (f) and to fix a definite and fixed standard for the construction and interpretation of every power of appointment, regardless of the intention of the testator or trustor creating such power. The regulations ignore the legal effect of the varying facts and circumstances in the widely differing cases coming up for construction before the courts and the many other elements which enter into and affect the interpretation of wills and trusts and the effect of powers of appointment therein contained. They disregard the fundamental principle of interpretation of powers, which is that "powers are to be construed in accordance with the intention of the donor or grantor, as determined under the rules relating to the construction of instruments generally." 49 C. J. 1260. "In determining the nature, scope and extent

of a power conferred by will, the intention of the testator governs." 69 C. J. 833.

The regulation, if held valid, would take from every state and lodge with an executive department the right to conclusively construe and interpret all powers in wills and trusts by iron-clad regulation.

It follows that, because of the lack of power of the Commissioner to promulgate Regulation 37 (and the later Regulation 80) there is no valid federal definition of the words "general power of appointment."

Regulation 37 was superseded in 1924 by Regulation 80. This regulation reads in part as follows:

> "*Ordinarily,* a general power is one to appoint to any person or persons in the discretion of the donee of the power." (Italics ours.)

The words of Regulation 80 are identical with the words of Regulation 37, with the exception of the word "ordinarily," which has been inserted in the later regulation. This word simply adds to the indefiniteness and uncertainty of the attempted definition in Regulation 37.

It will be seen that Regulation 80 purports to give the definition of the meaning of "general power of appointment" applying *only "ordinarily"* to powers which are to be construed to ascertain their meaning. In Webster's dictionary, the word "ordinarily" is defined to mean "customarily" or "usually." By the terms of the regulation it is plain that it does not purport to apply to *all* cases of general power of appointment. No rule is laid down by the regulation as to what proportion of the cases it will apply, and no rule is established therein for "unordinary" or "unusual" cases.

Regulation 80 cannot be held to fulfill the requirements of a statutory standard or definition. It is not even a valid administrative interpretation. Public statutes must be universal, according to Blackstone (25 R. C. L. 763). "A statute cannot be vague. It must be clear, certain, definite and specific." (59 C. J. 601.)

*Great Lakes Hotel Co.* v. *Commissioner*, 30 F. (2d) 1.

We have been unable to learn the reason for the insertion of the word "ordinarily" in Regulation 37, now Regulation 80. However, it must have become apparent to the taxing officers of the Government that the regulation could not establish a fixed and uniform rule governing all cases of wills and trusts containing powers. Therefore, the attempt was made to make the regulation more elastic through this insertion. The result is, however, that the regulation has been made thereby even more uncertain and indefinite than before.

A distinguished professor of law, Erwin N. Griswold, in discussing the changes above set out in these regulations has written: "For many years the only change (in the regulations) was the insertion of a *guarded 'ordinarily'* at the beginning of the first of the quoted sentences." (52 Harvard Law Review, 929, 938, April, 1939.) (Italics ours.)

Webster's definition of the word "guarded" is "exhibiting caution." The necessary implication of that word is that everyone dealing with powers of appointment must understand that this federal definition does not embrace *all* of the cases of general powers of appointment. It is indefinite and uncertain, and lacking in universal application and accordingly void even as a regulation.

But it may be replied that by the repeated reenactment of the Revenue Act of 1918, the original Treasury Regulation 37 (and the modified Treasury Regulation 80) containing definitions of general power of appointment and constituting thereby the administrative definition of the "general power of appointment" have been approved and adopted by Congress, and have therefore the force of a statute.

Even if that were true, the defect of indefiniteness, uncertainty and failure to include *all* general powers of appointment follows this definition into the statute and makes the statutory definition void.

Such being the case, even if it be held that the principle announced in *Burnet* v. *Harmel*, 287 U. S. 103, applies to the case at bar, the law of the State of Wisconsin would still control because, there being no valid federal definition of general power of appointment, either in the revenue statute or the regulations thereunder, and no binding federal decisions, Section 302(f) Revenue Act of 1926 by necessary implication has made its own operation dependent upon State law. Therefore the law of the State of Wisconsin must be resorted to here in order to ascertain the controlling definition and construction of the powers of appointment in question.

*United States* v. *Cambridge Loan and Building Co.*, 278 U. S. 55. (No federal definition of "building and loan association.")

*Wurlitzer* v. *Commissioner*, 81 Fed. (2d) 971. (No federal definition of "non-voting stock.")

*Graham* v. *Commissioner*, 95 Fed. (2d) 174. (No federal definition of the term "actually rendered.")

**(2) The decisions of the various courts of appeals of the United States, purporting to define general powers of appointment, said definitions being based upon the general usage or common law, which decisions were approved and followed by the Circuit Court of Appeals in support of its decision here, are not authority. There is no common law of the United States.**

*Johnstone* v. *Comm'r.*, 76 Fed. (2d) 55 (Ninth Circuit).

*Wear* v. *Comm'r.*, 65 Fed. (2d) 665 (Third Circuit).

*Lee* v. *Comm'r.*, 57 Fed. (2d) 399 (Dist. Col.).

*Stratton* v. *U. S.*, 50 Fed. (2d) 48 (First Circuit).

*Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 Fed. (2d) 600 (Third Circuit.)

*They are not authority because there is no common law of the United States. Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78.

All of the above decisions attempt to give a definition of "general powers of appointment." They are all based upon either state decisions or textbooks, which announce the "general usage" or common law.

In *Erie R. Co.* v. *Tompkins, supra*, this Court overruled *Swift* v. *Tyson*, 16 Pet. 1, 18, which held that federal courts were "free to exercise an independent judgment as to what the common law of the State is—or should be." The Court in *Erie R. Co.* v. *Tompkins* further declared (p. 71): "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, * * *. And no clause in the Constitution purports to confer such a power upon the federal courts."

**X.**

**The will of Isaac Stephenson was dated June 15, 1916. The deed of trust was executed May 12, 1917, and the fee to the property in question here was deeded to the trustees by him on the same date. Isaac Stephenson died March 15, 1918. The earliest federal revenue act in which property passing under the exercise of powers of appointment was taxed was enacted February 24, 1919. The attempt here to tax in the estate of Elizabeth S. Morgan the value of the property passing under the power of appointment to her, if held to be legal, is so arbitrary and capricious as to amount to a confiscation and offend the 5th Amendment.**

*Nichols* v. *Coolidge*, 274 U. S. 531, 542.

## CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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